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NATIONAL COMPANY LAW APPELLATE TRIBUNAL
PRINCIPAL BENCH: NEW DELHI

Company Appeal (AT) (Insolvency) No. 579 of 2023

(Arising out of the Impugned Order dated 24 March 2023 passed by the 'Adjudicating Authority' (National Company Law Tribunal, Mumbai Bench – V in CP (IB) No. 765/IBC/MB/2020]

IN THE MATTER OF:

Carestream Health India Private Limited
801, Star Hub, Building No. 2, Sahar,
Andheri (East) Mumbai – 400 059
Maharashtra
CIN: U29l99MH2006PTC165303 ...Appellant

Versus

Seaview Mercantile LLP
11 – B, Mittal Towers, 210, Nariman Point,
Mumbai – 400 021, Maharashtra
LLPIN: U74300MH1996PTC104127 ...Respondent

Present:

For Appellant : Ms. Fereshte Sethna, Mr. Abhishek Chauhan, Mr. Abhishek Tilak, Advocates

For Respondent : Mr. Sean Wassoodew, Advocate

J U D G M E N T
(Hybrid Mode)

[Per: Arun Baroka, Member (Technical)]

This judgment pertains to the appeal filed by Carestream Health India Private Limited ("Appellant") against the order dated 24 March 2023 issued by the Adjudicating Authority (National Company Law Tribunal, Mumbai, Bench-V), which dismissed the Appellant's application under Section 9 of the Insolvency and Bankruptcy Code, 2016 ("IBC") to initiate Corporate Insolvency Resolution Process (CIRP) against Seaview Mercantile LLP

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("Respondent"). The NCLT held that the Appellant did not qualify as an "Operational Creditor" under the IBC as the claim did not arise from the provision of goods or services to the Respondent.

Brief facts of the case:

2. The facts of the case as relevant to decide the matter are noted herein. On 7 May 2019, the Appellant and Respondent entered into a "Without Prejudice" Letter of Intent (WP-LOI) for leasing unit no. 702 in the Silver Metropolis building. The Appellant paid a security deposit of Rs. 25,68,280/. The Appellant discovered that the premises were not eligible for IT/ITES/STPI registration after due diligence, despite the initial representation. Consequently, the Appellant sought to terminate the LOI and requested a refund of the security deposit. The Appellant issued several notices and reminders to the Respondent seeking a refund, including:

- Email dated 4 June 2019 for cancellation and refund.
- Reminders on 18 June 2019 and 27 August 2019.
- Legal notice on 14 November 2019.
- Demand Notice under Section 8 of the IBC on 10 February 2020.

3. The Respondent replied on 17 February 2020, disputing the Appellant's claims and contending the right to forfeit the security deposit due to non-compliance by the Appellant. Thereafter, the Appellant filed a Section 9 petition on 20 February 2020, which the Learned NCLT dismissed on grounds that the Appellant did not qualify as an "Operational Creditor."

Case of the Appellant:

4. On 24 March 2023, the Adjudicating Authority (Learned NCLT, Mumbai, Bench-V) issued an impugned order holding that the Appellant does

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not qualify as an "Operational Creditor" because it has neither supplied goods nor provided services to the Respondent Corporate Debtor. It also held that the Appellant also does not meet the criteria of an "Operational Creditor" under Section 5(20) of the IBC, which specifies it must be the Central Government, State Government, or a local authority, according to the definition in Section 5(21). This interpretation is legally incorrect as the claimed amount does not qualify as 'operational debt' under Section 5(21) of the Code, implying no 'default' under Section 3(12).

5. Carestream Health India Private Limited ("Appellant") initiated Section 9 proceedings against Seaview Mercantile LLP ("Respondent") for a security deposit refund following the termination of a "Without Prejudice" Letter of Intent (WP-LOI) dated 07 May 2019 for unit no. 702 in the Silver Metropolis building. The termination arose because the premises, initially represented as suitable for IT/ITES/STPI activities (Clause 6), were found to be ineligible for such registration upon due diligence. Despite a revised "Without Prejudice" Letter of Intent (WP-LOI) draft on 21 May 2019 that removed Clauses 6 and 25, the licensing mandate granted to Cushman and Wakefield failed due to the lack of IT/ITES/STPI certification.

6. In a related proceeding taken up by the Appellant, a parallel WP-LOI with Calvin Associates LLP for adjacent premises 701 in the same building also resulted in the non-return of the security deposit. Section 9 proceedings (CP (IB) No. 764/MB-IV/2020) were instituted and adjudicated on 28 April 2023, resulting in Corporate Insolvency Resolution Process orders against

Calvin Associates. Both WP-LOIs were cancelled under identical circumstances.

7. Appellant claims that the following facts are undisputed:

- The WP-LOI was signed on 7 May 2019 and was subsequently cancelled.
- The security deposit was paid but has not been returned.
- The Appellant was ineligible for the ITES certificate as per the Maharashtra IT/ITES Policy 2015.
- The premises could not be lawfully licensed by the Respondent.

8. Appellant claims that multiple notices were sent requesting the security deposit refund and the details of the exchange of communication between them are as follows:

- Email on 04 June 2019 for cancellation and refund of Rs. 25,68,280/-
- Reminders on 18 June 2019 and 27 August 2019.
- Notice on 14 November 2019.
- Reply from Messrs. Narang Law on 03 December 2019, referencing M/s. Optium India Private Limited.
- Demand Notice under Section 8 of the I & B Code on 10 February 2020 for Rs. 25,68,280/- plus 18% interest of Rs. 3,37,248/-
- Respondent's reply on 17 February 2020.

9. The Appellant thereafter filed a section 9 petition on 20 February 2020. The Respondent's affidavit-in-reply was filed on 01 September 2020.

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10. The Appellant submits that security deposit is an Operational Debt as per the IBC Code and as per various rulings. The claimed amount qualifies as 'operational debt' under Section 5(21) of the I & B Code. The Hon'ble Supreme Court in ***Consolidated Construction Consortium Limited vs. Hitro Energy Solutions Private Limited [2022 (7) SCC 164]*** has held that advance payment to a Corporate Debtor for supply of goods and services is considered as an operational debt. The relevant extract of the decision is reproduced herein under:

> "50.1 *First*, Section 5(21) defines "operational debt" as a "claim *in respect of* the provision of goods or services". The operative requirement is that the claim must bear some nexus with a provision of goods or services, without specifying who is to be the supplier or receiver. Such an interpretation is also supported by the observations in the BLRC Report, which specifies that operational debt is in relation to operational requirements of an entity.
>
> 50.2 *Second*, Section 8(1) IBC read with Rule 5(1) and Form 3 of the 2016 Application Rules makes it abundantly clear that an operational creditor can issue a notice in relation to an operational debt either through a demand notice *or* an invoice. As such, the presence of an invoice (for having *supplied* goods or services) is not a sine qua non, since a demand notice can also be issued on the basis of other documents which prove the existence of the debt. This is made even more clear by Regulations 7(2)(*b*)(*i*) and (*ii*) of the 2016 CIRP Regulations which provide an operational creditor, seeking to claim an operational debt in a CIRP, an option between relying on a contract for the supply of goods and services with the corporate debtor *or* an invoice demanding payment for the goods and services supplied to the corporate debtor. While the latter indicates that the operational creditor should have supplied goods or services to the corporate debtor, the former is broad enough to include all forms of contracts for the supply of goods and services between the operational creditor and corporate debtor, including ones where the operational creditor may have been the receiver of goods or services from the corporate debtor.
>
> 50.3 *Finally*, the judgment of this Court in *Pioneer Urban* [*Pioneer Urban Land & Infrastructure Ltd.* v. *Union of India*, (2019) 8 SCC 416: (2019) 4 SCC (Civ) 1], in comparing allottees in real estate projects to operational creditors, has noted that the latter do not receive any time value for their money as consideration but only provide it in exchange for goods or services. Indeed, the decision notes that "[e]xamples given of advance payments being made for turnkey projects and capital goods, where customisation and uniqueness of such goods are important by reason of which advance payments are made, are wholly inapposite as examples vis-à-vis advance payments made by allottees". Hence, this leaves no doubt that a debt which arises out of advance payment made to a corporate debtor for supply of goods or services would be considered as an operational debt.

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> **52.** Similarly, in the present case, the phrase "in respect of" in Section 5(21) has to be interpreted in a broad and purposive manner in order to include all those who provide or receive operational services from the corporate debtor, which ultimately lead to an operational debt. In the present case, the appellant clearly sought an operational service from the proprietary concern when it contracted with them for the supply of light fittings. Further, when the contract was terminated but the proprietary concern nonetheless encashed the cheque for advance payment, it gave rise to an operational debt in favour of the appellant, which now remains unpaid. Hence, the appellant is an operational creditor under Section 5(20) IBC."

11. Appellant further claims that the Appellate Tribunal in ***Jaipur Trade Expocentre Private Limited vs. Metro Jet Airways Training Private Limited [Company Appeal (AT) Insolvency No. 423 of 2021**, **decided on 05 July 2022]**, overruled ***M. Ravindranath Reddy vs. G. Kishan [Company Appeal (AT) (Ins.) No. 331 of 2019]***, stating:

> "39. The Agreement contemplates GST payment for services, relevant under the Central Goods and Services Tax Act, 2017, hence, the Tribunal in Mr. M Ravindranath Reddy and Promila Taneja did not interpret 'service' correctly under Section 5(21). Unpaid license fees qualify as operational debt under Section 5(21).
>
> 40. Hence, the Licensor's claim for license fees for business premises use is an 'operational debt' under Section 5(21)."

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12. The decision in ***Consolidated Consortium Limited vs. Hitro Energy Solutions Private Limited (supra)*** and the Appellate Tribunal's ruling in ***Jaipur Trade Expocentre Private Limited vs. Metro Jet Airways Training Private Limited [Company Appeal (AT) Insolvency No. 423 of 2021]***, were cited by the Appellant, which support his case. It also claims that the ruling on 28 April 2023 regarding the parallel premises in the Calvin decision is applicable to the present case as referenced earlier.

<u>Case of the Respondent:</u>

13. The Respondent is a solvent entity with liquid assets significantly exceeding the disputed claim amount. For the Financial Year 2021-22, the

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Respondent's closing stock was valued at Rs. 47,73,042/- (Rupees Forty-Seven Lakhs Seventy-Three Thousand and Forty-Two only), comprising listed shares that are freely tradable on the stock exchange, making the proceeds immediately realizable. The Appellant's claim is for Rs. 29,31,193/- (Rupees Twenty-Nine Lakhs Thirty-One Thousand One Hundred and Ninety-Three only), which is substantially less than the Respondent's closing stock. Therefore, the Respondent cannot be considered a candidate for insolvency proceedings under the IBC.

14. It is established law that proceedings under the Insolvency and Bankruptcy Code (IBC) should not be initiated with the intent to recover dues, particularly when a pre-existing dispute exists. Solvent companies should not be subjected to Insolvency Resolution Process intended to rehabilitate financially distressed entities. The provisions of the IBC are designed to revive the Corporate Debtor rather than serve as a means for debt recovery.

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15. The amount claimed does not constitute an "operational debt" as defined in Section 5(21) of the Insolvency and Bankruptcy Code, 2016 (IBC). The Appellant seeks a refund of a security deposit paid under a Letter of Intent (LOI), which is a precursor to a leave and licence agreement. This does not pertain to the provision of goods or services, hence it does not qualify as operational debt.

16. A pre-existing dispute invalidates any application filed under Section 9 of the IBC. It is well-settled that if disputes between the parties exist, an application for Corporate Insolvency Resolution Process (CIRP) is not

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maintainable. In this case, the Appellant's demand notice was responded to by the Respondent, raising and indicating the existence of disputes. The following points highlight the pre-existing disputes:

16.1 There is a dispute regarding whether Annexure A3 at page 47 or Annexure A5 at page 53 is the subsequent LOI. The Corporate Debtor, in its reply to the demand notice and the Affidavit in Reply to the Petition, claimed that Annexure A3 is the subsequently executed document. The Operational Creditor has not denied this claim.

16.2 The LOI at Annexure A3 is dated 7 May 2019, while the LOI at Annexure A5 lacks a date on the execution page.

16.3 There are differences in clauses between Annexure A3 and Annexure A5. Clause 6 in Annexure A3 relates to "Premises Usage" for ITeS use, which is absent in Annexure A5. Clause 25 in Annexure A3 requires a DOI certificate, which is not mentioned in Annexure A5. The Appellant claims that the ITeS requirement was removed, while the Corporate Debtor asserts it was never removed, given the property's location in an ITeS building.

16.4 The Appellant's claim that the ITeS requirement was removed is contradicted by their actions and documents. The Operational Creditor attempted to obtain DOI certification for ITeS purposes, as evidenced by their email dated 4 June 2019, and acted upon the ITeS requirement.

16.5 Regardless of whether Annexure A3 or Annexure A5 is the subsequent LOI, both documents stipulate that a security

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deposit refund is due only if the licensee (OC) finds a defect in the title of the premises. Otherwise, the licensor (CD) has the right to forfeit the security deposit.

16.6 The termination of the LOI by the licensee (Operational Creditor) was due to its inability to obtain DOI certification for ITeS purposes, not due to a defect in title. Therefore, the Corporate Debtor was justified in forfeiting the security deposit.

16.7 The licensee (OC) is liable to pay the Corporate Debtor the license fee for the period they remained in possession of the premises (7 May 2019 to 20 June 2019). The payable amount is Rs. 23,97,108/- (license fee of Rs. 17,12,220 per month for 10,193 sq. ft at Rs. 117.90 per sq. ft as per Clause 15 and Clause 4.

16.8 The Operational Creditor is also liable for the lost license fee of Rs. 1,07,29,912/- (Rupees One Crore Seven Lakhs Twenty-Nine Thousand Nine Hundred and Twelve) for the period from 1 September 2019 to 8 March 2020, during which the premises remained vacant due to the licensee's default in executing the license agreement after entering into the LOI.

FALSE AND INCONSISTENT CASE OF THE APPELLANT

17. The building in question is governed by the IT/ITES policy. During the hearing on 14 July 2021, the Appellant contended that the premises were unsuitable for IT and ITeS services, despite being qualified for such use. This was the basis for their claim for a deposit refund. The Respondent argued that the premises were suitable for IT and ITeS services, and the Appellant's inability to obtain certification was their own default. This was recorded in

the order dated 14 July 2021. Subsequently, in the Additional Affidavit dated 16 February 2022, the Appellant admitted they did not pursue certification under the IT/ITeS policy. The Appellant deliberately suppressed the additional affidavit filed by the Respondent pursuant to the 14 July 2021 order.

18. On 8 March 2020, the Respondent had inducted M/s Reliance Nippon Life Insurance Co. Ltd as a licensee, who successfully obtained IT/ITES certification under the State of Maharashtra's IT/ITES policy. This demonstrates that even an insurance company could obtain IT/ITES certification, which the Appellant chose not to pursue.

<u>CASE LAW</u>

19. As per the Hon'ble Supreme Court in ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software Ltd., Civil Appeal No. 9405 of 2017***, a Section 9 IBC application is not maintainable if a dispute exists. The adjudicating authority must assess whether a plausible contention requires further investigation and if the dispute is not patently feeble or unsupported by evidence. The present dispute is genuine, demonstrable, and supported by incontrovertible evidence.

20. The judgement in ***Consolidated Construction Consortium Limited v. Hitro Energy Solutions Pvt. Ltd., (2022) 7 SCC 164***, clarified that the words "claim in respect of provision of goods or services" include claims by those who receive goods or services from the corporate debtor. However, the Appellant neither supplied goods nor received services from the Corporate Debtor. This judgment does not assist the Appellant.

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21. The ***Jaipur Trade Expo Centre Pvt. Ltd. v. Metro Jet Airways Training Pvt. Ltd (supra)*** case is relevant for claims toward unpaid license fees for immovable property as operational debt under the IBC. It does not support the Appellant's proposition that a security deposit is a form of license fee. In this case, no GST was payable or paid on the security deposit, and the deposit was not an advance license fee. The security deposit was for ensuring the Appellant entered into a license agreement and became liable to forfeiture due to non-performance.

22. Based on the above submissions, the Appeal should be dismissed.

Appraisal:

23. Heard the counsels of both sides and perused the documents placed before us.

24. The main issues before us are whether the claimed amount qualifies as an operational debt under the IBC and whether there exists a pre-existing dispute between the parties.

Nature of the Debt

25. Section 5(21) of the IBC defines an "operational debt" as a claim in respect of the provision of goods or services, including employment, or a debt arising under any law for the time being in force. The section is extracted as below:

> “5. Definitions. –
> In this Part, unless the context otherwise requires, –
> XXX
> (21) “operational debt” means a claim in respect of the provision of goods or services including employment or a debt in respect of the 2[payment] of

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dues arising under any law for the time being in force and payable to the Central Government, any State Government or any local authority;"

26. The Appellant's claim for the refund of a security deposit under the LOI does not pertain to the provision of goods or services but rather to a contractual obligation contingent upon executing a leave and license agreement. The security deposit here is linked to a conditional contractual arrangement and not to the actual provision of any goods or services. Therefore, the claim does not constitute an operational debt under the IBC.

27. We have thoroughly analysed the definition of "operational debt" under Section 5(21) of the IBC. This definition specifies a claim arising from the provision of goods or services. We find that while the LOI contemplated a future license agreement, the security deposit itself was not directly linked to any service rendered by Seaview.

28. We also look into the judicial precedent as cited by the Appellant in ***Consolidated Construction Consortium Limited v. Hitro Energy Solutions Pvt. Ltd. [supra].*** This judgement is only an authority for the proposition that the words "claim in respect of provision of goods or services" includes not only those who supply goods or services to corporate debtor but those who receive goods or services from the corporate debtor and the words "in respect of" must therefore not received a narrow interpretation but the claim must bear some nexus with the provision of goods or services. In the present case the Appellant has neither supplied goods nor services to the Corporate Debtor nor received goods or services from the Corporate Debtor. The said judgement is therefore of no assistance to the Appellant.

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29. The appellant has cited ***Jaipur Trade Expo Centre Pvt. Ltd. v. Metro Jet Airways Training Pvt. Ltd. (supra)*** which is now being seen for its applicability in the present case.

The relevant extracts are as follows:

> "39. The observation of this Tribunal in the above case in respect of definition of 'service' under Consumer Protection Act, 2019 and Central Goods and Services Tax Act, 2017 are not covered by Section 3(37) of the Code, with regard to which observation, no exception can be taken. However, in the facts of the present case, where Agreement itself contemplate payment of GST for the services under the Agreement, on which GST is payable, the definition of 'service' under Central Goods and Services Tax Act, 2017 cannot be said to be irrelevant. More so, even if an expression is not defined in the statute, the meaning of expression in general parlance has to be considered for finding out the meaning and purpose of expression. After making above observation in ***Promila Taneja's*** case (supra), this Tribunal did not dwell with the question as to what is the meaning of expression of 'service' used in Section 5(21) of the Code. Reference to Section 5(8)(d) regarding 'financial debt' by this Tribunal in the above case also was not relevant for finding out definition of expression 'service' under Section 5(21). We, thus, are of the view that both in ***Mr. M. Ravindranath Reddy*** and ***Promila Taneja*** this Tribunal did not dwell upon the correct meaning of expression 'service' used in Section 5(21) of the Code. In any view of the matter, in the above mentioned two cases, the dues were in the nature of rent of immovable property whereas the present is a case of license granted for use of premises on Warm Shell Building with fittings and fixtures, electrical, flooring as per good corporate standards. Hence, the Licnesee was licensed for a particular kind of service for use by the Licensee for running a business of Educational Institution. Hence, in the present case, debt pertaining to unpaid license fee was fully covered within the meaning of 'operation debt' under Section 5(21) and the Adjudicating Authority committed error in holding that the debt claimed by the Operational Creditor is not an 'operational debt'. The judgment of this Tribunal in ***Promila Taneja's*** case reiterate the law as laid down in ***Mr. M. Ravindranath Reddy's*** case. We having held that judgment of ***Mr. M. Ravindranath Reddy's*** case does not lay down correct law, the judgment in ***Promila Taneja's*** case can also not be followed.
>
> 40. In view of the foregoing discussion, we answer the two questions referred to the larger Bench in the following manner:
>
> (1) Judgment of this Tribunal in ***Mr. M. Ravindranath Reddy*** (supra) as well as judgment in ***Promila Taneja's*** case does not lay down the correct law.

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> (2) The claim of Licensor for payment of license fee for use of Demised Premises for business purposes is an 'operational debt' within the meaning of Section 5(21) of the Code."

30. The above-mentioned judgement is only an Authority for the proposition that a claim towards unpaid license fees for an immovable property would constitute an operational debt under the Insolvency and Bankruptcy Code, 2016 (Code). It doesn't support the cause of the Appellant that security deposit is a form of license fee available for adjustment on failure to meet the outstanding licence fee. In the present case, there is no outstanding licence fee and the security deposit, therefore, it cannot be termed as a form of license fee available for adjustment on failure to meet the outstanding licence fee. In any case, this judgement does not lay down any law that security deposit is a form of license fee. The said judgement proceeds on the basis that payment of GST was made on the license fee and as GST is only contemplated for goods and services, there were services rendered which would fall within the meaning of Section 5 subsection 21 of IBC. In the present case, no GST was payable or has been paid on the security deposit. ***In the present case, the security deposit was not an advance licence fee but deposit for ensuring that the Appellant entered into a license agreement.*** The same was not liable to be adjusted against any outstanding or future license fee. No services were rendered nor supplied either by the Appellant to the Respondent nor by the Respondent to the Appellant. On the contrary, the security deposit became liable to be forfeited on account of non-performance of the obligation of the Appellant i.e. it's requirement to enter into a leave and licence agreement. Thus, this is not a case of supply of goods or services.

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31. We therefore come to a conclusion that the scope of "operational debt" under the IBC ***does not encompass situations like security deposits unrelated to any immediate service rendered***.

32. Even if we presume that the security deposit is to be treated as an operational debt as claimed by the Appellant, the petition could not have been accepted under Section 9 of IBC as is analysed in subsequent paragraphs.

Existence of Pre-Existing Dispute

33. The IBC mandates that an application under Section 9 is not maintainable if a pre-existing dispute exists between the parties. The presence of such a dispute must be assessed to determine the maintainability of the application. The documents and correspondence provided by both parties highlight several points of contention:

1. Discrepancies in LOI: The Appellant submitted two versions of the LOI, Annexure A3 and Annexure A5, with significant differences in terms and conditions, particularly concerning IT/ITES usage and DOI certification. Second LOI is disputed by the Respondent. In fact, it is undated and as per Respondent was an earlier version which was to be destroyed.

2. Forfeiture Clause: Both versions of the LOI contained clauses allowing the Respondent to forfeit the security deposit if the Appellant failed to execute the license agreement. The Respondent's assertion of the right to forfeit the deposit is based on these provisions.

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3. Efforts to Obtain Certification: The Appellant's claim that the premises were ineligible for IT/ITES certification is contradicted by their actions, including attempts to obtain certification and subsequent communications indicating ongoing efforts to comply with IT/ITES requirements.

4. The conditions in the term sheet were incapable of performance as claimed by the Appellant. The Respondent claims that everything was known to the Appellant and it was its responsibility to obtain all permissions and it tried but later unilaterally cancelled the .

5. Possession and License Fee: The Appellant remained in possession of the premises from 7 May 2019 to 20 June 2019 without executing the final license agreement, thus triggering the Respondent's claim for a license fee for this period.

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34. The core of the dispute revolved around two aspects:

- Validity of the LOI: There was a disagreement about which version of the LOI (Term sheet in Annexure A3 or A5) was the final and binding document. Annexure A3, as claimed by Respondent Seaview, mentioned IT/ITES use and allowed deposit forfeiture for non-performance. Annexure A5, on the other hand, which Appellant-Carestream argued was the valid version, did not contain the IT/ITES requirement. In fact, the Respondent claims that the LOI at Annexure 3 was agreed to be destroyed as it was an earlier version.

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- Reason for Termination: The parties presented conflicting narratives regarding the justification for termination. Appellant - Carestream countered that the premises were inherently unsuitable for their intended purpose, absolving them of any liability. Respondent- Seaview contended that whether Term sheet in Annexure A3 or Annexure A5 was the subsequent LOI is immaterial as in both LOI's, in Clause 28[1] it is clearly laid down that only if the licensee (OC) found a defect in the title of the premises the security deposit would have to be refunded without interest whereas if the licensee (OC) chose not to enter into the leave and licence agreement for any other reason other than a defect in title, the licensor (CD) would have the right to forfeit the security deposit paid on the LOI.

35. We recognize these conflicting positions as a genuine dispute that precluded Carestream's application under Section 9 of the IBC. The judgement in ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software Ltd. [supra]*** is a supporting precedent, emphasizing that IBC proceedings are not the appropriate recourse when a bona fide dispute exists. The Hon'ble Apex Court has clarified that all that the Adjudicating Authority is *to assess is*

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28.	Termination of LOI	The Licensee may terminate this LOI, if the Licensee finds a defect in the title relating to the Premises (the Licensee has to carry out their due diligence within 30 working days from the date of signing off this term-sheet/LOI), and the Security Deposit paid on the signing of this term-sheet/LOI shall be refunded without any interest to the Licensee by the Licensor. The parties also agree that, in case the Licensee chooses not to enter into the Leave & License agreement for any reasons other than mentioned above, the Licensor shall have the right to forfeit the security deposit paid on this LOI.

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whether there is a plausible contention which requires further investigation and that the dispute is not patently feeble legal argument or an assertion of fact unsupported by evidence. As long as a dispute truly exists in fact and is not spurious, hypothetical or illusory, the adjudicating authority has to reject the application.

36. Given the above-mentioned substantial and documented disputes, it is clear that a pre-existing dispute exists. This aligns with the Supreme Court's guidance in ***Mobilox Innovations Pvt. Ltd. v. Kirusa Software Pvt. Ltd***. ***[supra]***, where it was held that if a dispute exists and requires further investigation, the application under Section 9 cannot be maintained.

37. The facts of each case are different and the case cited by the Appellant is not before us and therefore we do not want to comment on the related proceeding taken up by the Appellant with Calvin Associates LLP for adjacent premises 701 in the same building for which Section 9 proceedings (CP (IB) No. 764/MB-IV/2020) were instituted and adjudicated on 28 April 2023 by the Adjudicating Authority, resulting in Corporate Insolvency Resolution Process orders against Calvin Associates.

Conclusion:

38. Based on the foregoing analysis, we find that:

- The claimed amount does not constitute an operational debt under the IBC as it does not arise from the provision of goods or services.
- There exists a pre-existing dispute between the parties also, rendering the application under Section 9 of the IBC non-maintainable.

39. The appeal is dismissed. The order of the NCLT, Mumbai, Bench-V, dated 24 March 2023, is upheld. The Parties shall bear their respective costs of this appeal.

[Justice Yogesh Khanna]
Member (Judicial)

[Arun Baroka]
Member (Technical)

New Delhi
27th May, 2024

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